

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 14-06

**SANTA FE DISCOUNT CRUISE PARKING, INC. d/b/a EZ
CRUISE PARKING; LIGHTHOUSE PARKING, INC.; and
SYLVIA ROBLEDO d/b/a 81st DOLPHIN PARKING**

Complainants

v.

**THE BOARD OF TRUSTEES OF THE GALVESTON
WHARVES and THE GALVESTON PORT FACILITIES
CORPORATION**

Respondents

**OPPOSED MOTION FOR LEAVE TO FILE
FIRST AMENDED VERIFIED COMPLAINT**

COME NOW Santa Fe Discount Cruise Parking, Inc. d/b/a EZ Cruise Parking; Lighthouse Parking, Inc.; and Sylvia Robledo d/b/a 81st Dolphin Parking (collectively “Complainants”), by and through the undersigned, and hereby move, pursuant to 46 C.F.R. § 502.70 and FED. R. CIV. P. 15(a), for leave to file the attached First Amended Verified Complaint against the Board of Trustees of the Galveston Wharves (“Wharves”) and the Galveston Port Facilities Corporation (“GPFC”) (Wharves and GPFC sometimes collectively referenced as “Respondents”).

ARGUMENT

I. Standard of Review

Rules 12 and 66 of the Federal Maritime Commission's Rules of Practice and Procedure establish the standards applied to requests to amend or supplement pleadings. 46 C.F.R. §§ 502.12, 502.66 (2014). Rule 66 states that "[a]mendments or supplements to any pleading . . . will be permitted or rejected, either in the discretion of the Commission or presiding officer." 46 C.F.R. § 502.66 (2014). "Pleadings in administrative proceedings are easily amendable, even more so than in federal courts, and are not considered to be critically important. Rather they are general notice-giving instruments that allow respondents to prepare their defense." *Tak Consulting Eng'rs v. Sam Bustani*, Docket No. 98-13, 1998 WL 940845, at *7-8 (F.M.C. Oct. 22, 1998) (holding that a complaint could be amended and finding no prejudice to the respondents).

To this end, the Federal Maritime Commission has "flexible rules allowing amendments liberally." *John Barbeau v. M. Anderson, Ocean Beach Transfer & Storage, Inc.*, Docket No. 91-13, 1991 WL 382895, at *2 (F.M.C. May 16, 1991). Rule 12 of the Federal Maritime Commission's Rules of Practice and Procedure further explains that "for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice." 46 C.F.R. § 502.12 (2014). Under FED. R. CIV. P. 15(a), leave to amend a complaint is to be "freely given when justice so requires." The emphasis is on "freely given," and courts have repeatedly explained that this provision governing amended pleadings is to be liberally construed in favor of permitting amendments. Absent factors counseling against permitting the amendment – such as dilatoriness in filing, bad faith, or efforts to cause undue delay in the pending proceedings –

pleading amendments should be permitted. *See, e.g., Lowrey v. Texas A&M Univ. System*, 117 F.3d 242, 245 (5th Cir. 1997); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962).

II. Complainants should be Permitted to Amend their Verified Complaint.

In May 2014, Respondents approved increases in access fees charged under the Wharves' Tariff Circular No. 6, Item 111 ("2014 Tariff") to become effective July 1, 2014, and Complainants initiated the instant action in June 2014 challenging same. Subsequently, on September 22, 2014, the Wharves approved a modification to the 2014 Tariff indicated that those formerly being charged Off Port Parking User Access Fees (such as Complainants) will now incur Per Trip Access Fees pursuant to the rates previously published in the 2014 Tariff. However, to date, the Wharves Board has not published this change to the 2014 Tariff.

As indicated in the parties' Joint Status Report submitted on September 29, 2014, Complainants contend that Respondents' modification to 2014 Tariff continues to be unlawful because: (a) Respondents are attempting to recover the same amounts of money from Complainants by a different means; (b) the modified 2014 Tariff continues to preferentially exempt certain commercial vehicles (i.e., "taxicabs") from access fees on its face; and (c) the modification fails to resolve Complainants' previous and outstanding discriminatory practice complaints with regard to enforcement issues.

Accordingly, the recent action taken by Respondents during pendency of this action necessitates an amendment to Complainants' pleadings to identify the issues that remain after the Wharves' modification of their 2014 Tariff, especially those regarding Complainants' existing claims for reparations and attorneys fees for disparate treatment under the 2014 Tariff *prior to modification* – which Respondents now acknowledge existed because they treated Complainants differently (i.e., as "Off Port Parking Users") under the 2014 Tariff.

Further, good cause exists for granting leave in this instance. Permitting this amendment will allow Complainants to streamline the issues to be decided and, therefore, should not cause delay or inconvenience of the parties. Moreover, Respondents would not be prejudiced if leave is granted, since Complainants' need to amend their pleadings was brought about by the Wharves' modification of their 2014 Tariff during the pendency of this action. As such, in seeking leave, Complainants have not acted in bad faith or with any dilatory motive.

Submitted simultaneously with this Motion is Plaintiffs' proposed First Amended Verified Complaint, which does not in any way amend the substance of the original allegations or broaden the issues. As such, the amendment should not in any way affect the Respondents' responsive pleadings.

On October 23, 2014, Complainants counsel contacted Anthony Brown, counsel for Respondents, the Wharves and GPFC, regarding the subject matter of this motion. As of the date of this filing, Complainants have not received a response from Mr. Brown and, therefore, Respondents necessarily should be considered opposed to the relief requested herein.

CONCLUSION

Based on the foregoing, Complainants respectfully request that Your Honor grant Complainants' Motion for Leave to File their First Amended Verified Complaint.

Respectfully submitted,

GILMAN * ALLISON LLP

Douglas T. Gilman

dgilman@gilmanallison.com

Texas Bar No. 24048496

Tex. S.D. Fed. I.D. No.19897

Brenton J. Allison

ballison@gilmanallison.com

Texas Bar No. 24040417

Tex. S.D. Fed. I.D. No. 36863

2005 Cullen Blvd.

Pearland, Texas 77581

Telephone (713) 224-6622

Facsimile (866) 543-3643

**Attorneys for Complainants Santa Fe
Discount Parking, Inc. d/b/a EZ Cruise
Parking, Lighthouse Parking, Inc., and
Sylvia Robledo d/b/a 81st Dolphin Parking**

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this document on this **24th day of October, 2014**, and that a true and correct copy of the foregoing was served on all counsel of record *via* certified mail – return receipt requested and email, as indicated below:

Anthony P. Brown

Wm. Hulse Wagner

MCLEOD, ALEXANDER, POWEL & APFFEL, P.C

P.O. Box 629

Galveston, Texas 77553

apbrown@mapalaw.com

whwagner@mapalaw.com

**ATTORNEYS FOR THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES
AND GALVESTON PORT FACILITIES CORPORATION**

Douglas T. Gilman